SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 265

CLARENCE W. BLAIR
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of Pennsylvania

and

BRIEF IN SUPPORT THEREOF

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Clarence W. Blair, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on May 22, 1944.

Opinions Below

The opinion of the Common Pleas Court of Allegheny County, Pennsylvania, (R.133) is not reported.

The opinion of the Supreme Court of Pennsylvania (R.144) is reported in 349 Pennsylvania 346.

JURISDICTION

The statutory provision believed to sustain the jurisdiction of this Court is Sec. 237 of the Judicial Code as amended (U.S.C.A., Tit. 28 Sec. 344) which provides in its pertinent portion: (b) "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination . . . any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had . . . where any title, right, privilege or immunity is especially set up or claimed by either party under . . . any statute of . . . the United States . . ."

The Federal Employers Liability Act, 45 U.S.C. 51 provides: (Sec. 6 as amended)

> The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States . . ."

QUESTIONS PRESENTED

1. Whether the Supreme Court of Pennsylvania erred in holding there was no issue of fact for the jury's consideration as to whether Respondent complied with its common-law and statutory duty to provide Petitioner with reasonably safe and sufficient tools and appliances with which to perform his work?

2. Whether the Supreme Court of Pennsylvania erred in holding there was no issue of fact for the jury's consideration as to whether Respondent complied

with its common-law and statutory duty to provide Petitioner with reasonably sufficient and skillful fellow-servants to perform the work?

3. Whether the Supreme Court of Pennsylvania erred in holding there was no issue of fact for the jury's consideration as to whether Respondent was negligent in that two members of its makeshift unloading crew abandoned their hold on the load before exerting their utmost physical strength to avert the catastrophy?

4. Whether the Supreme Court of Pennsylvania erred in re-examining the facts to a different conclusion, after they had been submitted to a jury which found Respondent negligent and assessed the damages at Twelve thousand dollars?

5. Whether the Amendment to the Federal Employers Liability Act of August 11, 1939 applies to this case which occurred June 26, 1939 and suit was not brought until June 18, 1941?

CONSTITUTION and STATUTE INVOLVED

The Seventh Amendment to the Constitution of the United States which in its pertinent parts provides:

> "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers Liability Act as amended (45 U.S.C. 51) which provides in part:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT

Petitioner, Respondent's sole freight house employee at Elwood City, Pa., brought this action under the provisions of the Federal Employers Liability Act in the Common Pleas Court of Allegheny County, Pa., to recover for personal injuries resulting in permanent and total disability, which he sustained on June 26, 1939 while unloading an interstate shipment of three steel pipes or tubes weighing in excess of a thousand pounds each and being approximately thirty feet in length and ten inches in diameter. The pipes were greased. The only tools and appliances furnished were two hand trucks, obviously designed for moving trunks, bales and boxes, a dolly, a crow-bar (Photo R. 138) and several short lengths of discarded iron pipe; there were no pipe-tongs, chain-hoists or other mechanical appliances provided to securely engage and carry this type of freight. Petitioner being physically unable to remove the pipe from the box-car with the equipment furnished him, consulted his superior, Respondent's Station Agent and requested

that the pipe be left in the car and be thus delivered to Consignee's mill in Elwood City, where adequate mechanical unloading facilities were available, as had been Respondent's practice theretofore when heavy freight arrived. The Station Agent overruled the suggestion and ordered Petitioner to call upon the aging and infirm car-inspector to assist him, and also to commandeer the services of the section-foreman (whose gang was not at work on that day) which was accordingly done. Neither of these men summoned from other employments was experienced in this type of work and Petitioner being unable to approve their skill, told the Agent he didn't think the three could do it (R 15) whereupon the Agent preemptorily replied that if he couldn't do the work they would get somebody else who would. (R. 15)

Thereupon Petitioner with the car-inspector and the section foreman entered the box-car and succeeded in lifting one of the pipes upon the hand truck which was about five feet long, the pipe extended beyond the truck both fore and aft some twelve feet and it was necessary for the men upon their haunches to hold the truck handles close to the floor and thus move the heavy load thereby keeping the pipe on an even keel or in a horizontal position so that the forward end would not gouge into the floor and upset the unstable vehicle. A number of zig-zag movements were necessary to get the long pipe out the center door of the box-car and across the steel plate to the freight house platform then through the freight house to the door on the far side where consignee's truck was waiting to receive them. The first pipe was managed. The second pipe while thus being transported

across the freight house floor with the men crouching, struck an uneven place in the floor and the greased pipe started to slip from its insecure moorings; the car-inspector and the section-foreman let go their holds and scurried for safety; the pipe fell off kicking the hand truck backward with great violence, the leg of it striking Petitioner in the abdomen just under the floating ribs.

Petitioner's Statement of Claim (R. 7) averred insufficiency of tools and appliances with which to do the work; inadequate and unskilled help and the negligence of the fellow employees in releasing their hold on the pipe to Petioner's peril.

The case came on for trial and at the close of the evidence Respondent moved for a directed verdict, which was refused. The case was submitted to the jury under a comprehensive exposition of the law by the trial judge. (R. 112) After deliberation the jury found Respondent negligent and assessed the damages at Twelve thousand dollars. Respondent then moved for a new trial and also moved for judgment notwithstanding the verdict. The latter motion was overruled but after long deliberation the court granted a new trial for the sole reason (Certificate of Trial Judge to that effect R. 137) as stated in the opinion: (R. 135)

> "Plaintiff contended that the defendant was answerable for negligence in three particulars, viz., failure to provide adequate equipment for the work; failure to provide sufficient help, and carelessness of its employees as described above. The trial judge

asked the jury to pass on all three particulars. This was error."

"While there was sufficient testimony to support the third particular and, therefore, to permit the plaintiff to recover, there was no sufficient testimony to support the first and second, although under the charge of the court the jury was permitted to base a recovery on either. We cannot now determine on which particular the jury found the defendant had been negligent, and a new trial will be granted."

"Because we considered the verdict in this case to be just and reasonable, we have deliberated a long time before ordering a new trial. In order that neither party may be further delayed the case will be listed for trial immediately after the resumption of jury trials in September next."

Respondent appealed to the Supreme Court of Pennsylvania from the refusal of its motion for judgment notwithstanding the verdict.

Respondent having appealed, Petitioner thereupon also appealed from the order granting a new trial, being of the opinion the trial court did not err in submitting to the jury the alleged failure to provide adequate equipment for the work and the alleged failure to provide sufficient help. Had we gone into a second trial, the second trial judge under the stare decisis rule would doubtless have excluded inadequate equipment and insufficient help from the second jury's consideration, to the great prejudice of your Petitioner, by depriving him of the benefit

before the jury of the two most culpable insufficiencies alleged, the failure to perform the primary common law duties.

The Supreme Court of Pennsylvania after argument, on May 22, 1944 entered judgment for Respondent, holding: (Opinion R. 144)

> "In addition to alleging the elements of inadequate equipment and insufficient help, as to which the court said there was no evidence, the plaintiff alleged that he was injured by the negligence of defendant's servants. We think there was no evidence of such negligence."
>
> "As the witness said, when the pipe was balanced on the truck, 'All you had to do was push and steady it'; a risk of the employment was that the equilibrium of the pipe might be disturbed but that was a risk which the workmen assumed."
>
> "The mere happenings of this unfortunate accident is not evidence of negligence. The obvious risk of the employment was that the pipe might get out of balance and if it did, that men would instinctively act to protect themselves. We see no evidence to support a finding of negligence."

Thus the learned Court dismissed the question of the "insufficiency" of a five foot hand truck to wheel a thirty foot, 1000 pound greased cylinder that would roll off except for the steadying hands of the crouching, moving men simultaneously keeping the pipe horizontal or on an even keel and at the same time pushing the heavy, precariously balanced load.

No mention is made in the opinion of the unusual and extraordinary nature of the work necessitating the calling in of the section foreman and the car inspector to assist; their age, waning vigor, appearance or inexperience apparently raises no issue of lack of sufficient help or due care, and Petitioner under the decision must assume the risk "that men would instinctively act to protect themselves" no matter how indifferent or feeble their effort to avert serious accident.

Under the decision a workman assumes the risk of injury from the carelessness of a fellow employee with whom he has never worked before, and whose skill and ability he has had no reasonable time to appraise.

SPECIFICATIONS OF ERROR TO BE URGED

1. In entering judgment for Respondent.

2. In failing to reverse the Trial Court's order granting a new trial, the alleged error in instructing the jury being without merit.

REASONS FOR GRANTING OF WRIT

1. Petitioner's constitutional guarantee of trial by jury has been violated.

2. The decision of the Supreme Court of Pennsylvania is in conflict with the decisions of this Court as expressed in *Bailey, Admx. vs. Central of Vermont*, 319 U.S. 350; *Pederson vs. D. L. & W. Ry. Co.*, 229 U.S. 146; *Tennant vs. Peoria and P. U. Ry. Co.*, 321 U.S. 29.

CONCLUSION

it should be granted.

Respectfully submitted,

CLARENCE W. BLAIR

by J. THOMAS HOFFMAN and
RANDALL B. LUKE,
Attorneys for Petitioner.

The only mechanical tools and appliances furnished
ellant, the single freighthouse man, to unload the
sand pound, thirty foot, greased pipe, were two hand
ks and a dolly. (Photo R. 138) These were ob-
sly designed to move trunks, bales and boxes and were
lly unsuited to move greased cylindrical objects of
t length and weight, which overloaded and overhung
hand truck a distance of twelve feet in each direction,
fore and aft. The pipe had to rest on the horizon-
metal nosing of the truck's forward end, with nothing
ecure it or prevent its dangerous rolling or shifting
pt the steadying hands of the two hastily summoned,
perienced and unskilled, aging and infirm albeit kind-
nd willing members of the improvised emergency labor
g. The manual movement of heavy pipe calls in
mon knowledge for the employment of pipe-tongs,
re the men stretched along both sides of the length
he pipe, like pall-bearers carrying a lighter burden,
bearing a fractional part of the load and the factor
afety being such that if one man releases his hold, it
n't result in dire consequences. Goose-neck cranes and
table chain hoists are also well known appliances in com-
use for moving such loads with facility and ease.

When the master in modern industry or transporta-
employs methods that savor of the ox-cart era, and
emptorily orders his servant to encounter dangerous
k with insufficient and inadequate tools and appliances
with inexperienced and unskilled help, hastily sum-
ed from their regular inspection and supervisory em-
yments requiring no great muscular exertion, and in

the performance of the temporary assignment an easily anticipated accident results and a workman's earning power is permanently destroyed, may it be said there is no evidence of culpability on the part of the master for a jury's consideration, under a statute which provides for liability if the accident be due in whole or in part to insufficiency in men or appliances and/or negligence of fellow employees? Our imagination pictures no more obvious inadequacy or insufficiency than is here presented unless it be the proverbial furnishing of a fork for eating soup.

The trial court after refusing the motion for a directed verdict and after the jury's $12,000.00 verdict for Appellant, refused the motion for judgment notwithstanding the verdict but granted the motion for a new trial on the sole ground (court so certified R. 137) that the Court had erred in submitting to the jury for its consideration the questions of reasonably safe tools and appliances and the sufficiency of the help provided. Those we say were both questions of fact for the fact finding body. We submit the Court was right the first time when those questions were submitted to the jury, and erred when it later concluded it had erred in so doing. The Court stated in the opinion (R. 136) that the verdict was fair and reasonable and that it had deliberated a long time; torn, perhaps, between varying considerations to grant or refuse the motion for a new trial.

The new trial was never reached, Respondent appealed to the Supreme Court of Pennsylvania from the refusal of its motion for judgment nothwithstanding the verdict and Appellant then also appealed from the order

granting a new trial, believing the trial Court had committed no error warranting a re-trial.

The Pennsylvania Supreme Court figuratively finished the tree-pruning process and sawed off the last remaining of the three limbs: the negligence of the fellow employes in releasing their hold of the pipe before exerting the utmost of their strength, thus causing the load to fall and the truck to kick back with terrific violence and strike the Appellant. The Supreme Court held there was no evidence of negligence under the Federal Employers Liability Act for submission to the jury and entered judgment for Respondent; this petition for Certiorari follows, Appellant believing that his Constitutional right to trial by jury has been violated; that reading the testimony in a light most favorable to him he was entitled to have the jury determine which evidence it would believe and pass on the credibility of the witnesses whom they met face to face and whose physical vigor and strength they could in some measure observe, rather than have an appellate court re-examine the evidence from the cold type of a printed record and arrive at a different conclusion, although denied the benefit of seeing and hearing the witnesses and observing their demeanor, to determine their candor or freedom from prejudice or mental reservation.

AUTHORITIES

Pederson vs. D. L. & W. R. R. Co., 229 U.S. 147

This was an action under the Federal Employers Liability Act to recover for personal injuries sustained through the negligence of co-employes. At

the trial the court refused to direct a verdict for defendant; the jury found for plaintiff. Subsequently the Court following the local statute (Penna. Laws 1905 p. 286 c. 198) entered judgment for the defendant notwithstanding the verdict, on the ground that the latter was not sustained by the evidence. Mr. Justice Van Devanter in the opinion said "In this the Court was in error, first because it was without authority to do so (*Slocum vs. N. Y. Life Ins. Co.*, 228 U.S. 364) and second because the evidence did not warrant such a judgment."

Thomkins vs. Erie R. R. Co., 98 Fed. 2nd 49
Certiorari denied 305 U.S. 637
Rehearing denied 305 U.S. 673

"A plaintiff has a right to a jury trial in an action for injuries when any issue of fact remains to be settled."

Robostelli vs. N. Y. R. Co., (C.C.A. N. Y. 1888)
33 Fed. 796

"This amendment guarantees the right to have all questions of fact as to negligence passed upon by a jury, and the right involves not only the existence of the facts themselves, but the inferences as to the exercise of due care to be drawn from the facts when established."

Justices vs. Murray (N. Y. 1870)
9 Wall. 278; 19 L.E. 658.

This clause applies to the appellate powers of the United States in all common law cases coming up

from inferior federal courts and also in cases of federal cognizance coming up from a state court.

Chicago R. Co. vs. Chicago, 166 U.S. 242.

The last clause of this amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court of the United States by writ of error from the highest court of the state.

Jacob vs. City of New York, 315 U.S.752

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Ives vs. Grand Trunk R. R. Co.
35 Fed. 176, Affirmed 144 U.S. 408

The weight and balancing of evidence are for the jury and their conclusion upon it in respect to its preponderance when fairly reached, is not reexaminable. When a case is such that it must be submitted to a jury, conclusiveness of the verdict must follow.

THE SUPREME COURT OF PENNSYLVANIA ERRED IN HOLDING THERE WAS NO JURY ISSUE

Chicago & N. W. R. Co. vs. Bowers, 241 U.S. 470

"The rule of law is: That the employer is under duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but it is not required to furnish the latest, best and safest appliances, provided those in use are reasonably safe and suitable."

Tiller vs. Atlantic & C. L. R. Co. 318 U.S. 54

". . . Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

"Where the facts are in dispute and the evidence in relation to them is that from which fair minded men may draw different inferences, the case should go to the jury."

Union Pac. R. Co. vs. Hadley, 246 U.S. 330

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling on each. But the whole may be greater than the sum of its parts and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed

to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

Galloway vs. U. S. (Cal. 1943) 319 U.S. 372; rehearing denied 320 U.S. 214

The remedy for abuse of discretion by court in ruling on question whether evidence is sufficient for submission to jury is by correction on appellate review. The essential requirement in determining whether evidence is sufficient for jury is that mere speculation be not allowed to do the duty of probative facts after making due allowances for all reasonably possible inferences favoring party whose case is attacked.

Bailey vs. Central Vermont Ry. 319 U.S. 350

The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. *Jones vs. E. Tenn. V. & G. R. Co.* 128 U.S. 128.

To withdraw such questions from the jury is to usurp its functions. The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence. It is a part and parcel of the remedy afforded railroad workers under the Federal Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. To deprive these workers of the benefit of a jury

trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

Great Northern R. Co. vs. Leonidas, 305 U.S. 1

"We are not prepared to say that the hazard of carrying a railroad tie was so open and obvious that the plaintiff as a matter of law must be held to have assumed the risk of injury by yielding obedience to the command of the foreman. He lifted and carried it successfully until he stepped on the rock and turned his ankle, at which time he fell with the weight on his back. This was a situation that the jury was warranted in finding defendant railway company and its foreman in the exercise of reasonable care, should have anticipated in the light of common experience."

Northern Pacific R. R. Co. vs. Herbst, 116 U.S. 464

"A servant does not by his contract of employment assume the risks arising from the want of sufficient and skillful co-laborers. The liability of the employer is the same whether he totally fail to provide persons to perform a duty he owes his servants, or provide persons who are unskilled and incompetent."
Tenant vs. Peoria, P. U. Ry. Co., 321 U.S. 29

"A judgment for defendant notwithstanding a verdict for plaintiff deprived the latter of the right of trial by jury."

"The court is not free to reweigh the evidence and set aside the jury verdict merely because the jury

could have drawn different inferences or conclusions or because the court regards another result as more reasonable."

C. R. I. & P. R. Co. vs. Ward, 252 U.S. 18

"The defense of assumption of risk is inapplicable when the injury arises from a single act of negligence creating a sudden emergency without warning to the servant or opportunity to judge the resulting danger."

C. B. & Q. vs. U. S. 220 U.S. 574

"It is quite conceivable that Congress contemplated the inevitable hardship of such injuries and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard."

It is respectfully submitted that the judgment sought to be reviewed is not in harmony or accord with the decisions of this Court under the Act; that the question is a substantial one and that a writ of certiorari should be issued.

J. Thomas Hoffman
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